NO. 53777-0-II

DIVISION II OF THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON

LLRIG TWO, LLC, ET AL.

v.

RV RESORT MANAGEMENT, LLC, ET AL.,
APPELLANTS

OPENING BRIEF OF APPELLANT MILLS

J. MILLS, WSBA 15482
PRO SE
3713 N 22ND STREET
TACOMA, WASHINGTON 98406
TELEPHONE 253-226-6362

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

CASES FROM OTHER JURISDICTIONS

STATUTES AND COURT RULES

ASSIGNMENTS OF ERROR

1. The trial court erred in awarding fees under the ABC rule because there is no outside litigant "C"; this is a dispute between current business partners and their various LLCs.
2. The trial court erred in calculating malpractice damages because it failed to calculate the value of the Sterling Notes that plaintiffs acquired at a steep discount due only to the work of the attorney.
3. Because there are no recoverable damages, the malpractice claim fails as damage is an element of malpractice.
4. The trial court erroneously allowed Mr. Kyler and Mr. Adams to represent both Lost Lake Resort Investment Group, LLC (hereinafter "LL-1"), and LLRIG Two, LLC (hereinafter "LL-2"), at trial; they then abandoned all equitable claims of LL-1 to a beneficial or equitable interest in the Sterling Notes, leaving the erroneous impression that all litigation on those issues was specious and without merit.
5. The trial court erred in modifying a four-year bifurcation order on the eve of trial and forcing the attorney defendant to switch from a bench trial to a jury trial with only a week's notice.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

Business partners cooperate in buying an asset whose ownership (as between the partners) is disputed. If a decision is made to litigate over ownership, can any of the litigation fees be awarded under "equitable indemnity" – the so-called "ABC Rule"?

An attorney assists a client in buying millions of dollars in promissory notes, secured by millions of dollars' worth of real property, at a huge discount. Should the value of the notes received by the client be offset against any alleged "damages" arising out of litigation over who owns the notes?

Can plaintiffs' attorney properly be allowed to represent a critical defendant with significant counterclaims against plaintiff?

Did the trial court err in amending a bifurcation order days before trial?

STATEMENT OF THE CASE

This case has already been reviewed by the Court of Appeals in cause No. 49069-2-II. The case came before the court on an appeal from summary judgment. The facts set out there by the court are generally believed to be accurate; or at least any disputes are immaterial to this appeal, with the exception of the response to my first motion in limine, CP 3658, where Mr. Kyler and Mr. Adams seem to imply that LL-1 has no claims left from that appeal. The background is as follows.

FACTS

Background

Jeff Graham owned two parcels, the 85-acre parcel being developed into residential lots known as Lost Lake Resort, LLC (hereinafter "LLR"), and an additional 56-acre parcel with four undeveloped lots known as Lost Lake Development, LLC (hereinafter "LLD"). As of 2010, Lee and Lori Wilson (hereinafter "the Wilsons") held a deed of trust on the 56-acre parcel securing a note for approximately $319,000, later renewed for four $100,000 notes. In 2010, Graham asked a group of investors--Brent McCausland, David Block, Tom Deutsch, and Gary Monette--to loan him money to

develop the 85-acre parcel. The investors agreed to loan Graham the money and formed a limited liability company called Lost Lake Resort Investment Group, LLC (LL-1). As security for the loan, Graham gave a deed of trust to LL-1 against the 56-acre parcel. Clerk's Papers (CP) 3038.

Later in 2010, the Wilsons entered into an agreement with LL-1 to assign their note and deed of trust encumbering the 56-acre parcel to LL-1 in return for a 49 percent interest in LL-1. CP 62-63. (This deed of trust is distinguished from the Sterling Savings Bank Deed of Trust that encumbered the 85-acre LLR property.)

Graham then filed for bankruptcy in 2010, as did LLD. LLR was listed as an asset in Graham's bankruptcy filing. The 85-acre parcel held by Graham was subject to security devices, including the Sterling Savings Bank Notes and Deed of Trust (hereinafter "Sterling Notes and DOT"), as Sterling Savings Bank had taken over for the original lender. CP 3038-3039.

Graham instructed J. Mills, an attorney who at that time represented only the Wilsons in the bankruptcy proceedings, to make an offer to Sterling Bank, on behalf of no one in particular, to purchase the Sterling Notes and DOT. The bank accepted the offer on condition that LL-1 be the purchaser and that the deal include release of LL-1's

and Graham's claims against the bank.[1] At the time, LL-1 had no money. Its sole assets were the notes secured by the deed of trust on LLD's 56-acre parcel with an original balance of $800,000 and its claim against Sterling Bank for failing to honor their predecessor bank's promise to release 37 lots to the resort owners. (This was a condition of the payment of the $400,000 advanced to LL-1, as the funds were paid directly to the bank's receiver. CP 279-281; CP 344-358, p. 4, item 7.)

Mills then contacted two of the LL-1 investors, McCausland and Block (as his client Lee Wilson had suffered a stroke and was in the hospital), and asked whether they wanted to purchase the Sterling Notes and DOT. McCausland and Block told Mills they wanted to buy them as individuals or in a newly created LLC, which they would exclusively own. Sterling Bank, however, would only sell the Notes and DOT to LL-1. Mills advised McCausland and Block that they could purchase the Sterling Notes and DOT using their own money but in the name of LL-1, and then after the purchase by LL-1, they could transfer the Notes and DOT from LL-1 to their newly created LLC.[2]

[1] Graham was not an investor or member of LL-1.

[2] It was never disputed that at some point, Mr. Block and Mr. McCausland wanted to buy the notes in their name alone. It's not disputed that they were told the notes could be moved around after purchase. But, it's also undisputed that Sterling Bank would only sell to LL-1 and eventually everyone signed off on that deal; accordingly, what Mr. Block and Mr. McCausland may have wanted is basically irrelevant. What's disputed is whether, having agreed to a sale of the notes to LL-1, Mr. Block and Mr. McCausland ever asked or were told that they could take the notes without any compensation to the Wilsons or other members of LL-1. The Court can surmise that

McCausland and Block spoke to the other LL-1 investors, Monette and Deutsch, and obtained their approval to transfer the Sterling Notes and DOT to the newly created LLC. The Wilsons were not involved in the purchase decision or the approval of the transfer. Mills also apprised Graham that McCausland and Block had purchased the Sterling Notes and DOT. CP 3039-3040.

Mills then created a new LLC, LL-2, solely owned by McCausland and Block. McCausland and Block then purchased LLR and LLD from the bankruptcy trustee. Mills then prepared assignment documents for McCausland, as the manager of both LL-1 and LL-2, to assign the Sterling Notes and DOT from LL-1 to LL-2. Mills then prepared a Deed in Lieu of Foreclosure from LLR to LL-2, so that McCausland and Block would receive title to the developed lots in the 85-acre parcel, and the balance of the undeveloped property was agreed to be deeded to LLD. Mills then withdrew from representing any of the parties. CP 3040.

it's unlikely that Mr. Block and Mr. McCausland ever asked Mills, *who was not then their attorney*, "Can we just take the notes from LL-1 to the detriment of other members?" And, importantly, the trial court never found that they were advised that the notes could be taken with impunity and without compensation. (Those issues were left for trial.) Generally, partners are not allowed to usurp business opportunities without fair compensation to the other partners. See article in Appendix. Particularly important is that LL-1 gave consideration for the notes in the form of (if nothing else) release of all claims and an indemnity and hold-harmless to Sterling Bank. That remains a liability of LL-1 today irrespective of who owns the Sterling Notes.

The Wilsons subsequently agreed to buy the other investors' 51 percent interest in LL-1, including the shares of McCausland and Block. The Wilsons entered into a purchase agreement and agreed not to sell or transfer any interest in LL-1 until all of their payments for the sale were made. Under this agreement, the Wilsons owned 100 percent of LL-1. Shortly thereafter, the Wilsons claimed to have transferred their 100 percent interest in LL-1 to a new LLC, RV Resort, which was owned by the Wilsons and Graham's mother. Mills then tendered to either the Wilsons or RV Resort the original Sterling Notes and DOT, which Mills had never delivered to LL-2 despite the assignment of the Sterling Notes and DOT to LL-2. CP 3040.

The Wilsons started foreclosure on the Sterling DOT and then later started foreclosure on LLD through the deed of trust originally held by LL-1. CP 3040.

Procedural History

In 2013, McCausland, Block, Deutsch, and Monette filed a lawsuit against the Wilsons and RV Resort seeking a return of their 51 percent interest because of the Wilsons' breach of the purchase agreement. In a separate lawsuit, LL-2, LLR, McCausland, and Block sued RV Resort, the Wilsons, Graham, and LL-1 alleging that the Sterling Notes and DOT were owned by LL-2, not the Wilsons or RV Resort, among other claims. In the separate lawsuit, LL-2, LLR,

McCausland, and Block also sued Mills for malpractice. The parties settled some of the claims in both lawsuits, reserving other claims for trial, and agreed that "to simplify resolution of the remaining issues between them related to the ownership of two Sterling Savings Bank [N]otes secured by a [D]eed of [T]rust . . . [the case] will be determined based upon the facts and events that had occurred as of April 1, 2013." CP 432-434, p. 2, item 5. The parties also agreed that the trial court would determine the validity of the Wilsons' attempted transfer of the 49 percent interest in LL-1 to RV Resort. The two lawsuits were consolidated. CP 3041.

Summary Judgment

LL-2, LLR, McCausland, and Block filed a motion for partial summary judgment, asking the trial court to determine whether LL-2 owned the Sterling Notes and DOT. In their motion, they alleged that (1) neither LL-1 nor RV Resort owned any interest in the Sterling Notes and DOT and (2) the Wilsons, not RV Resort, owned a 49 percent interest in LL-1. They argued three theories at summary judgment: (1) that the transfer of the Sterling Notes and DOT from LL-1 to LL-2 was effective; (2) that the transfer complied with LL-1's operating agreement because a majority of the investors had approved the transfer; and (3) that they were entitled to ownership of the Sterling Notes and DOT under the doctrines of resulting trust or constructive

trust. They argued that because it was undisputed that McCausland and Block purchased the Sterling Notes and DOT with their individual funds and that all parties involved intended that the Sterling Notes and DOT would belong to LL-2, therefore LL-2 held the Sterling Notes and DOT. Finally, they argued that, as a matter of law, the Wilsons' attempted transfer of their LL-1 interest to RV Resort should be declared void. CP 3041-3042.

RV Resort, the Wilsons, and LL-1 filed a response to the motion, arguing that the transfer of the Sterling Notes and DOT to LL-2 violated paragraph 7.6 of the operating agreement because the operating agreement required a vote of a majority of disinterested investors. Paragraph 7.6 of LL-1's operating agreement provides: "No Member shall have any right to demand or receive any distribution from the Company in any form other than cash, upon dissolution or otherwise." CP 63-72, p. 4. They argued that McCausland did not have the authority to transfer the Sterling Notes and DOT without consent of the majority of disinterested investors. They also argued that neither a constructive nor resulting trust was established, because even though Block and McCausland paid Sterling Savings Bank for the Notes and Deed of Trust it held, LL-1 gave consideration for the purchase. CP 3042. Another reason, they argued, was that the bank demanded that LL-1 be the purchaser. CP 344-358, p.5, item 11.

After a hearing, the trial court on Dec. 18, 2015, determined that LL-2 owned the Sterling Notes and DOT and granted partial summary judgment. The trial court also ruled that the Wilsons owned only 49 percent of LL-1, and that their attempted transfer of LL-1's assets to RV Resort was "void and of no effect," and granted the partial summary judgment motion. CP 511-514.

Importantly, while the trial court determined that LL-2 owned bare title to the Sterling Notes and that the transfer did not violate various provisions of LL-1's operating agreement, neither the trial court nor the Court of Appeals in its affirming opinion addressed who owned the beneficial or equitable interest in the notes; that is, whether the transfer to LL-2 breached fiduciary duties for which the Wilsons or LL-1 could recover damages. See notes 5, 6, and 7 to COA No. 49069-2-II (e.g., "The trial court in its partial summary judgment order did not make a determination on whether the transfer constituted a breach of fiduciary duty. LL-2, Lost Lake Resort, LLC, McCausland, and Block did not file a motion for summary judgment on that issue, and thus, the issue of damages for the alleged breach of fiduciary duty remains for trial."). CP 3037-3050, page 10, note 7.

Dual Representation

It is readily apparent that the core question of whether the transfer of the Sterling Notes without compensating LL-1 gave rise to

damages has not been resolved by either the trial court or the jury verdict. The reason is that LL-2's attorneys, at trial, assumed also the role of LL-1's lawyers and then simply abandoned all claims relating to breach of fiduciary duty owed LL-1 by Mr. Block and Mr. McCausland, or to violation of RCW 25.15.155 or its successor RCW 25.15.038 (effective 1/1/16), when the Sterling Notes were transferred to LL-2. As a result, all the LL-1 claims and the fiduciary duty issues simply vanished from the case at trial.

This conflicting representation by these lawyers dates back to March 2016, when LL-1 (51% owned by Block and McCausland) hired Mr. Kyler to collect notes owed by LLD (100% owned by Block and McCausland), which was also Mr. Kyler's client. See Appellant's Supplemental Memo Re Conflicts, by J. Mills, Mar. 5, 2019.[3] In July 2018 both Mr. Kyler and Mr. Adams were hired by LL-1 to resist collection of monies owed LL-1 by its debtors (which included LLD). CP 3476-3479, p. 2 lines 24-25 & p. 3, lines 1-2. In February 2019 Kyler and Adams filed an Answer against the interests of LL-1 in favor of LLD. CP (Answer). In the same month LLD filed a Motion in Limine asking to dismiss all collection activities of LL-1 against LLD. CP (MIL) A written order was never entered, and from the bench Judge Lanese stated, "There will be no derivative claims in this trial."

[3] Appellants Wilson submitted an Amended Statement of Arrangements, 8/17/2020, to have this document included in the Clerk's Papers.

CP (Transcript of Hearing) In 2018 the balance of these debts was in excess of $3,000,000, CP (Wilson dec in really big SJ by Cushman)

ARGUMENT

STANDARD OF REVIEW

Whether plaintiffs are entttled to an award of damages under the so-called ABC rule is a legal question and accordingly reviewed de novo.

Whether the value of the Sterling Notes should be calculated in the trial court's assessment of damages and whether therefore the malpractice claim fails for lack of damages are also legal questions reviewed de novo.

Whether it is ethical and therefore lawful for Mr. Adams and Mr. Kyler to act as attorneys both for LL-1 and its opponents LL-2 and LLD at trial is also a legal question reviewed de novo.

It's conceded that a trial court has fairly plenary discretion in organizing trials and the procedures for trial. Generally, such decisions are reviewed for abuse of discretion. Still, its decisions have to meet the standards set out in the civil rules. CR 1 says:

> These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

A trial court abuses its discretion if its decisions are based on untenable grounds or untenable reasons. Whether it was reasonable to

put defendant Mills to the burden of preparing for a jury trial in a matter of days is reviewed for abuse of discretion.

LAW AND ANALYSIS

The trial court erred in awarding fees under the ABC rule because there is no outside litigant "C"; this is a continuing dispute between current business partners and their various LLCs.

Mr. Block and Mr. McCausland seek attorney fees and costs arising from litigation with their business partners the Wilsons; however, that claim fails as a matter of law because Mr. Block and Mr. McCausland caused the litigation to commence and the Wilsons were connected to the original transaction upon which litigation was based. There is basically no "C" litigant in this case.

Despite receiving the benefit of their lawyer's work in securing the multi-million-dollar Sterling Notes, Mr. Block and Mr. McCausland claim they are entitled to "damages" of nearly half a million dollars in fees and costs incurred because the Wilsons would not give up their claim to 49% of the Sterling Notes arising from their interest in LL-1 and plaintiffs would not give up their claim to sole ownership of the Sterling Notes.

The facts, which are not disputed, do not demonstrate any malpractice as it is not forbidden to represent multiple clients having coinciding interests. Once the clients ceased working cooperatively,

their attorney Mills—as required by the ethical rules—withdrew. That's not disputed.

While Block and McCausland claim that the conflicts disclosure prepared for them was "inadequate," what they really are insisting they were entitled to is not a conflicts waiver, but a *substantive waiver of the Wilsons' interest (if any) in the Sterling Notes*. The Wilsons' attorney (obviously) could not ethically provide that waiver of the Wilsons' claim to ownership of 49% of the Sterling Notes.

The rule in Washington is that absent a contract, statute, or recognized ground of equity, attorney fees will not be awarded as part of the costs of litigation. Pennsylvania Life Ins. Co. v. Dept. of Employment Sec., 97 Wn.2d 412, 413, 645 P.2d 693 (1982). One of the recognized equitable grounds under which fees can be awarded as damages rather than costs is the theory of equitable indemnity. Under this theory, the court may award fees where the natural and proximate consequences of a defendant's wrongful act put the plaintiff in litigation with others. Manning v. Loidhamer, 13 Wn. App. 766, 769, 538 P.2d 136, *rev. denied*, 86 Wn.2d 1001 (1975). The original suit generating the expenses must be instituted by a third party not connected with the original wrongdoing. Armstrong Constr. Co. v. Thomson, 64 Wn.2d 191, 195, 390 P.2d 976 (1964). In general, three

elements are necessary to create liability: (1) A wrongful act or omission by A [Mills] toward B [Block and McCausland]; (2) such act or omission exposes or involves B in litigation with C [the Wilsons]; and (3) C [the Wilsons] was not connected with the initial transaction or event, viz., the wrongful act or omission of A toward B. Tradewell Group, Inc., v. Mavis, 71 Wn. App. 120, 126, 857 P.2d 1053 (Div. 1 1993). This formulation of the equitable indemnification exception to the American Rule is called the "ABC" rule.

Although this Court did not originate the "ABC" formulation of the rule, the Court of Appeals extrapolated it from a long line of this Court's decisions in equitable indemnity attorney fee cases dating back to 1907. Manning v. Loidhamer, *supra* at 769.

Critical to proper application of the ABC rule is the issue of sole causation. Washington courts have "consistently held that a party may not recover attorney fees under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C." Id. at 128 (citing Stevens v. Security Pac. Mortg. Corp., 53 Wn.App. 507, 768 P.2d 1007, *rev. denied*, 112 Wn.2d 1023 (1989) and Western Community Bank v. Helmer, 48 Wn.App. 694, 740 P.2d 359 (1987)).

There are four reasons critical to why the Wilsons and Mr. Block/McCausland are feuding. First, Block and McCausland joined

with the Wilsons in LL-1. That happened before Mills's involvement with any of the parties. Second, Sterling Bank insisted that the sale include as consideration, in addition to the cash, a waiver of claims LL-1 might have against the bank, and also an indemnification against liability on account of any other claims arising from the bank's dealings with Lost Lake. CP 74. Third, the bank insisted on selling its notes to LL-1. Fourth, the Wilsons have been attempting to collect against LL-2 or LLD for all of the Wilsons' notes and the note originally issued to LL-1 from Graham/LLD. The Wilsons have consistently fought to obtain judgments on these notes.

Irrespective of the third reason – Sterling Bank's insistence on selling to LL-1 – and based solely on the other two factors, LL-1's waiver of claims and indemnification, LL-1 would have an arguable claim to an interest in the notes, and thus the Wilsons would have an arguable claim on some part of the notes arising from their 49% interest in LL-1.

Separately, the only reason any of the parties had an opportunity to buy the notes was due to LL-1's activity of lending money to Jeff Graham, and the possible purchase of the Sterling Notes was a business opportunity that Mr. Block and Mr. McCausland could not legally appropriate to themselves free and clear of a claim by the

Wilsons. See article on "Usurpation of Business Opportunity" in the Appendix.

Given the structure of the purchase and sale of the Sterling Notes as insisted upon by Sterling Bank, any effort by any member or members of LL-1 to appropriate the notes free and clear of claims by other members was bound to result in litigation. That litigation was caused not by any attorney "malpractice" — and no one claims that Mr. Mills was deficient in arranging the purchase of the notes — but rather by the fact that Mr. Block and Mr. McCausland were both members of LL-1 and that LL-1 was pledging its assets as part of the consideration for purchase of the Sterling Notes.

In Tradewell, *supra*, Tradewell grocery store leased space from Wedgwood shopping center. Id. at 123. Tradewell and Wedgwood negotiated an extension to the lease, which only Tradewell signed. Id. When Tradewell met with a prospective purchaser of the grocery store, Craig Mavis, Tradewell falsely represented to Mavis that Wedgwood had signed the lease extension. Id. When Wedgwood expressed concerns about Tradewell's prospective buyer, Tradewell agreed that Wedgwood could negotiate directly with Mavis. Id. Tradewell then told Mavis to make a written offer to purchase the grocery store. Id. at 124. Mavis submitted a written offer of $500,000 and Tradewell accepted. Id. When Mavis met with Wedgwood, he told Wedgwood

that he had an agreement with Tradewell to purchase the store. Id. After Mavis and Wedgwood signed a long-term lease, Mavis reduced his offer to Tradewell to $250,000. Id. Tradewell rejected the reduced offer and the parties never reached agreement. Tradewell sued Mavis and Wedgwood. Id.

Tradewell's claims against Mavis included breach of the agreement to purchase the store, promissory estoppel, unjust enrichment, and tortious interference. Id. Tradewell's claims against Wedgwood included breach of the lease extension agreement, promissory estoppel, unjust enrichment, and tortious interference. Id. at 124-25. At the conclusion of trial, the court dismissed Tradewell' s claims and ruled in favor of Mavis and Wedgwood. Wedgwood then sought an award of costs and attorneys' fees against Tradewell and Mavis under the doctrine of equitable indemnity. The trial court ordered Mavis to pay a portion of Wedgwood's fees. The court found that Mavis misrepresented the status of his agreement with Tradewell, which was a proximate cause of Tradewell's decision to sue Wedgwood. The trial court's award did not include the fees and costs Wedgwood incurred in defending against Tradewell's claims for promissory estoppel, tortious interference, and undue influence.

The Court of Appeals reversed the trial court's decision to award Wedgwood the attorneys' fees and costs related to Mavis's

misrepresentation based on an equitable indemnity theory, because Mavis's conduct was not the only reason that Tradewell sued Wedgwood:

> [W]e have consistently held that a party may not recover attorney fees under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C. . . . In our view, the critical inquiry under the causation element of equitable indemnity is whether, apart from A's actions, B's own conduct caused it to be "exposed" or "involved" in litigation with C.

Id. at 128-29.

The Court of Appeals again had opportunity to apply the ABC rule in Blueberry Place Homeowners Ass'n v. Northward Homes, Inc., 126 Wn. App. 352, 359, 110 P.3d 1145 (2005), reaching the same result ("As in Tradewell, Northward is not entitled to the attorneys' fees and costs it incurred in defending claims related to the defective heating system based on equitable indemnity because the homeowners sued Northward for independent and separate defective construction claims").

Thus, under the theory of equitable indemnity, Block/ McCausland may only claim an equitable right to attorney fees stemming from the Block/McCausland vs. Wilsons litigation if actions by Mills alone caused Block/McCausland to become involved in litigation with the Wilsons.

Mr. Block and Mr. McCausland argue that Mr. Mills's "wrongful act," viz., joint representation, was the sole "cause" of the litigation. However, plaintiffs are not asking to rescind the purchase of the Sterling Notes; nor are they seeking damages for purchase of the Sterling Notes. The damages claimed arise out of the competing claim by the Wilsons that LL-1 properly owns the notes. They identify as a "wrongful act" an asserted inadequate disclosure about joint representation, but the only thing that would have avoided the litigation would be for Mr. Mills to have obtained a waiver of substantive rights to ownership of the Sterling Notes – either a waiver by Mr. Block and Mr. McCausland or a waiver by the Wilsons. Had either side waived their substantive rights to claim an interest in the Sterling Notes, obviously the litigation could have been avoided. But Mr. Mills could not, consistent with his duties to all clients, obtain a substantive waiver of rights.

When it became apparent that the parties were not cooperatively working to develop the Lost Lake project, Mr. Mills withdrew. Subsequent attorneys for the Wilsons and Block/ McCausland could also get neither a substantive waiver of rights or a settlement of claims; hence, all the litigation that ensued. But the litigation arising between various parties as to the purchase and sale of the Sterling Notes, and particularly plaintiffs' claim to own 100% of

the Sterling Notes free and clear of any breach of fiduciary duties to the Wilsons arising from the transfer out of LL-1, are simply not claims against a party unrelated to the sale and accordingly don't fall under the equitable indemnity theory of recovery.

The trial court erred in calculating malpractice damages because it failed to calculate the value of the Sterling Notes plaintiffs acquired at a steep discount due only to the work of the attorney.

The legislature has defined "[e]conomic damages" as "objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities." RCW 4.56.250(1)(a). Before a fair amount of "damages"can be ascertained, the court needed to starrt with the huge value of the sterling notes recovered by plaintiffs due to the work of their attorney.

The trial court erroneously allowed Mr. Kyler and Mr. Adams to represent both LL-1 and LL-2 at trial; they then abandoned all equitable and statutory claims of LL-1 to a beneficial or equitable or trust interest in the Sterling Notes, leaving the erroneous impression that all litigation on those issues was specious and without merit.

They also abandoned the collection of the notes owed to LL-1 from LLD/McCausland and Block totaling some 3 million dollars.

The case of Nunez v. Lovell, a U.S. District Court Memorandum Opinion, attached in the Appendix, and authorities cited therein, appears to be an authoritative discussion of conflicts, waiver, and the inability of one lawyer to represent both plaintiffs and a key defendant. The District Court opined:

> No one could conscionably contend that the same attorney may represent both then plaintiff and defendant in an adversary action. . . . Obviously, the attorney cannot serve the opposed interests of his two clients fully and faithfully.

Id. at 3 (quoting from Jedwabny v. Philadelphia Transportation Co., 390 Pa. 231, 135 A.2d 252 (1957), *cert. denied*, U.S. 966 (1958)).

And this:

> Bornn's simultaneous representation of the plaintiffs and a defendant in the same litigation is precisely the sort of situation that Rule 1.7(a) contemplates and that courts roundly find impermissible. *See*, e.g., *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449, 452 (S.D.N.Y. 2000) ("[I]t is improper *per se* for an attorney to participate in a lawsuit against his or her own client in a situation in which the lawyer has traditional attorney-client relationships with both clients.")

Id. at 4, citing Cinema 5, Ltd., v. Cinerama, Inc.,528 F.2d 1384, 1387 (2d Cir. 1976).

The undersigned submits that the Nunez v. Lovell case supports the proposition that Mr. Kyler and Adams should have been disqualified.

Marriage of Wixom, 182 Wn.App. 881, 332 P.3d 1063 (Div. 3 2014), a Washington case, also discusses and concludes that certain conflicts are not waivable because the interests of the parties are directly conflicting. Id. at 897-902. Here, that's also true. If the transfer of notes to LL-2 violated fiduciary duties owed the Wilsons, then the case presents an unwaivable conflict – a direct financial conflict. What LL-1 gains, comes at the entire expense of LL-2, which loses what LL-1 gains. If those claims by LL-1 are abandoned, then LL-2 gains exactly what LL-1 loses because its claims were abandoned.

The problem with abandoning LL-1's claims as to *all* defendants is that it leaves the jury (and court) with the impression that LL-1 never had any reason to litigate at all and that litigation over ownership is entirely meritless and accordingly, an unjustified interference in plaintiffs' business at Lost Lake.

There is, of course, a claim, but it has to be made by LL-1's lawyers at trial.

There is an obvious standing issue arising in connection with this argument. Defendant Mills has/claims no interest in LL-1 or LL-2 and accordingly is ambivalent as to how their claims resolve, particularly the fiduciary duty claim. However, standing arises because the wholesale abandonment of LL-1's fiduciary duty claim leaves the jury (and court) with the impression that there are no viable arguments

about ownership or interest in the Sterling Notes or the collection of any other debt. That adversely impacts the jury question about whether all the litigation is merely tortious interference in the business of running Lost Lake. Abandoning the fiduciary duty claims thus impairs defendant Mills's right to a fair trial on the jury claims.

Because there are no damages, the malpractice claim fails as damage is an element of malpractice.

To establish a claim for legal malpractice, a plaintiff must prove the following elements: (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred. See Hansen v. Wightman, 14 Wash.App. 78, 88, 538 P.2d 1238 (1975); Sherry v. Diercks, 29 Wash.App. 433, 628 P.2d 1336, *rev. denied*, 96 Wash.2d 1003 (1981); see also Bowman v. Doe, 104 Wash.2d 181, 185, 704 P.2d 140 (1985).

In this case there are simply no damages, partly because the ABC rule does not apply, and partly because the value of the Sterling Notes was not shown by plaintiffs to be less than fees incurred in

defending their ownership against claims by LL-1 that the Notes were taken in violation of fiduciary duties.

The trial court erred in modifying a four-year bifurcation order on the eve of trial and forcing the attorney defendant to switch from a bench trial to a jury trial with only days notice.

This case was subject to an early bifurcation order directing that all claims against defendant Mills be tried separately. Just days before trial, plaintiffs' motion to modify that and subject Mr. Mills to a jury trial on some claims was granted. Jury trials are infinitely more complex to prepare for, for at least two reasons. First, the court has a wealth of background information going into the trial as to procedural and substantive matters; a jury has to be given everything from scratch. Second, the court gets to ask questions more or less freely, which a jury does not get to do. Accordingly, preparation for a jury trial is infinitely more complex. The bifurcation order stood for nearly four years without challenge. To change it on the eve of trial was manifestly unfair. No serious reasons were advanced to justify the change and, accordingly, changing the bifurcation order was an abuse of discretion.

CONCLUSION

Malpractice has as its elements: 1) an attorney-client relationship, 2) attorney's conduct falling below the standard of care,

3) damages, 4) proximate cause linking the attorney's contract to damages. Because there are no recoverable damages, the case should be remanded with instructions to dismiss the malpractice claim..

There are no damages because plaintiffs' receipt of the Sterling Notes (even 51% of those notes) is a huge windfall asset and there is no evidence that the litigation costs of trying to hold onto 100% of the value of the notes exceeds the value of the notes plaintiffs received.

There are also no recoverable damages because this is not an ABC case.

The case should be remanded for a new trial with instructions to disallow Mr. Kyler and Mr. Adams from representing both plaintiffs and LL-1, a critical defendant with substantial counterclaims against plaintiffs. Allowing the same lawyers to represent plaintiffs and an important defendant undermines the integrity of the adversary system and is fundamentally unfair to LL-1 and all other defendants. It resulted in the abandonment of LL-1's claims, thereby leaving the jury to believe that all litigation over equitable interests in the notes appeared specious. The trial court should also be instructed to dismiss the malpractice claim as there are no recoverable damages.

REQUEST FOR EXPENSES

Appellant should be awarded his costs on this appeal if he prevails. RAP 14.2, 18.1.

RESPECTFULLY SUBMITTED this _____ day of _____ 2020.

_____

J. Mills, WSBA #15482
Appellant Pro Se

APPENDIX

RCW 4.56.250

Claims for noneconomic damages—Limitation.

(1) As used in this section, the following terms have the meanings indicated unless the context clearly requires otherwise.

(a) "Economic damages" means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.

(b) "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

(c) "Bodily injury" means physical injury, sickness, or disease, including death.

(d) "Average annual wage" means the average annual wage in the state of Washington as determined under RCW 50.04.355.

(2) In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner. For purposes of determining the maximum amount allowable for noneconomic damages, a claimant's life expectancy shall not be less than fifteen years. The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.

(3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (2) of this section.

[1986 c 305 § 301.]

RCW 25.15.038

General standards—Limitation of liability.

(1)(a) The only fiduciary duties that a member in a member-managed limited liability company or a manager has to the limited liability company and its members are the duties of loyalty and care under subsections (2) and (3) of this section.

(b) If a manager is a board, committee, or other group of persons, this section applies to each person included in such board, committee, or other group of persons as if such person were a manager.

(2) The duty of loyalty is limited to the following:

(a) To account to the limited liability company and hold as trustee for it any property, profit, or benefit derived by such manager or member in the conduct and winding up of the limited liability company's activities or derived from a use by such manager or member of limited liability company property, including the appropriation of a limited liability company opportunity;

(b) To refrain from dealing with the limited liability company as or on behalf of a party having an interest adverse to the limited liability company; and

(c) To refrain from competing with the limited liability company in the conduct or winding up of the limited liability company's activities.

(3)(a) The duty of care is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law in the conduct and winding up of the limited liability company's activities.

(b) A member or manager is not in violation of the duty of care as set forth in (a) of this subsection if, in discharging such duty, the member or manager relies in good faith upon the records of the limited liability company and upon such opinions, reports, or statements presented to the limited liability company by any person, including any manager, member, officer, or employee of the limited liability company, as to matters which the member or manager reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the limited liability company, including opinions, reports, or statements as to the value and amount of the assets, liabilities, profits, or losses of the limited liability company or any other facts pertinent to the existence and amount of assets from which distributions to members might properly be paid.

(4) A manager or member does not violate a duty under this chapter or under the limited liability company agreement merely

because the manager's or member's conduct furthers the manager's or member's own interest.

(5) A manager or member is not liable to the limited liability company or its members for the manager's or member's good faith reliance on the limited liability company agreement.

(6) To the extent that, at law or in equity, a member or manager has duties (including fiduciary duties) to a limited liability company or to another member, manager, or other person bound by a limited liability company agreement, the member's or manager's duties may be modified, expanded, restricted, or eliminated by the provisions of a limited liability company agreement; provided that such provisions are not inconsistent with law and do not eliminate or limit:

(a) The duty of a member or manager to avoid intentional misconduct and knowing violations of law, or violations of RCW 25.15.231; or

(b) The implied contractual duty of good faith and fair dealing.

(7) A limited liability company agreement may contain provisions not inconsistent with law that eliminate or limit the personal liability of a member or manager to the limited liability company or its members or other persons bound by a limited liability company agreement for conduct as a member or manager, provided that such provisions do not eliminate or limit the liability of a member or manager for acts or omissions that involve intentional misconduct or a knowing violation of law by a member or manager, for conduct of the member or manager violating RCW 25.15.231, or for any act or omission that constitutes a violation of the implied contractual duty of good faith and fair dealing.

[2015 c 188 § 11.]

2005 Washington Revised Code RCW 25.15.155: Liability of managers and members.

Unless otherwise provided in the limited liability company agreement:

(1) A member or manager shall not be liable, responsible, or accountable in damages or otherwise to the limited liability company or to the members of the limited liability company for any action taken or failure to act on behalf of the limited liability company unless such act or omission constitutes gross negligence, intentional misconduct, or a knowing violation of law.

(2) Every member and manager must account to the limited liability company and hold as trustee for it any profit or benefit derived by him or her without the consent of a majority of the disinterested managers or members, or other persons participating in the management of the business or affairs of the limited liability company from (a) any transaction connected with the conduct or winding up of the limited liability company or (b) any use by him or her of its property, including, but not limited to, confidential or proprietary information of the limited liability company or other matters entrusted to him or her as a result of his or her status as manager or member.

[1994 c 211 § 402.]
Repealed by 2015 c 188 § 108, effective January 1, 2016.

RULE CR 1
SCOPE OF RULES

These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

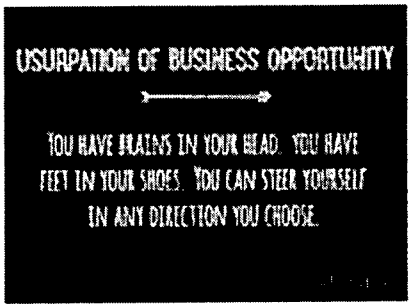
[Adopted effective July 1, 1967; amended effective September 1, 2005.]

FRAMEWILLS

Law Firm
Blog

Commercial Litigation

Usurpation of Business Opportunity



One business litigation matter our Chicago commercial litigation attorneys have noticed appears quite frequently is the business tort of usurpation of business opportunity. This commercial litigation tort is inextricably interconnected to breach of fiduciary duty principles. In short, it is the fiduciary duty not to usurp a business or corporate opportunity by which only arises by virtue of a fiduciary relationship.

Estate Planning

The typical business scenario involves a recognized fiduciary, such as a corporation officer or director, or a member of a limited liability company or a partner in a partnership, diverting a usually lucrative business opportunity for his or her own personal benefit in direct violation of a fiduciary duty of loyalty. The business tort generally arises where a corporate director or officer, a member or manager of a limited liability company, or a partner in a partnership obtains confidential information from a third party and uses that information to divert a prospective economic advantage to himself or herself.

Business Transaction

> The corporate opportunity doctrine is a disclosure rule, requiring a company's fiduciary to first disclose any opportunity prior to taking advantage of the opportunity (for himself) that is in the company's same line of business.

The fiduciary duties owed by officers, directors and shareholders of a company include the obligation to refrain from taking business opportunities that belong to the company. Essentially, the "corporate opportunity doctrine" is a disclosure rule, requiring a company's fiduciary to first disclose any opportunity prior to taking advantage of the opportunity (for himself) that is in the company's same line of business. The corporation must first be given the opportunity to decide, with full disclosure, whether or not to take advantage of the particular business opportunity.

For example, corporate officers and directors have duty of loyalty to refrain from purchasing property for themselves if the corporation has an actual or expectant interest in the property or if the purchase would hinder or defeat the corporation's legitimate business plan or corporate strategy.

The corporate opportunity doctrine is often difficult to apply in small business settings, where corporate formalities are not always observed, where each fiduciary might want the opportunity, where distributional interests might be held by someone other than an owner, or where the company might be close to insolvent.

Trademarks

Business Organization

BUSINESS & WEALTH LAW FIRM

Our Chicago corporate lawyers and Chicago estate planning attorneys offer legal counsel to businesses, professionals, entrepreneurs and families in Chicago and throughout Illinois. We invite you to contact our law firm and schedule an

CHAD and VANESSA NUNEZ, Successor in Interest to BANCO POPULAR de PUERTO RICO, Plaintiffs,

v.

CASSANDRA LOVELL a/k/a CASSANDRA MAUREEN LOVELL, TOM GIGILOTTI and MAGEN's RIDGE CONDOMINIUM ASSOCIATION, Defendants.

Civil No. 2005-7

District Court, Virgin Islands Division, St. Thomas and St. John

October 3, 2008

Adam Hoover, Esq. For the Plaintiffs.

Cassandra Lovell a/k/a Cassandra Maureen Lovell Pro se defendant.

Tom Gigilotti Pro se defendant.

David A. Bornn, Esq. St. Thomas, U.S.V.I. For Magen's Ridge Condominium Association.

MEMORANDUM OPINION

CURTIS V. GOMEZ Chief Judge.

This matter is before the Court for a determination whether Attorney David A. Bornn, Esq. ("Bornn") should be disqualified from this matter.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

Banco Popular De Puerto Rico ("Banco Popular") commenced this debt and foreclosure action in January, 2005 against the defendants, Cassandra Lovell a/k/a Cassandra Maureen Lovell ("Lovell"), Tom Gigilotti ("Gigilotti") and Magen's Ridge Condominium Association ("MRCA"). Neither Lovell nor Gigilotti has ever been represented by counsel during these proceedings. MRCA is represented by Bornn.

MRCA thereafter filed an answer to Banco Popular's complaint. MRCA also filed a cross-claim against Lovell and Gigilotti, alleging that Lovell and Gigilotti owed MRCA unpaid condominium dues. On Banco Popular's request, default was entered against Lovell and Gigilotti in July, 2005 on Banco Popular's claims.

In October, 2005, Banco Popular moved for summary judgment against MRCA and default judgment against Lovell and Gigilotti. MRCA filed a response to the motion. That motion is pending.

In September, 2006, the plaintiffs in this matter, Chad Nunez and Vanessa Nunez (the "Plaintiffs"), filed a notice of substitution of real party in interest, asserting that they had acquired Banco Popular's mortgage. The notice was signed and filed by Bornn.

In February, 2007, the Plaintiffs and MRCA, through their identical counsel, Bornn, filed a renewed request for entry of default against Lovell and Gigilotti.[1] That request is pending.

On June 26, 2008, the Court held a status conference in this matter. Bornn attended on behalf of the Plaintiffs and MRCA. No other party attended. The Court ordered Bornn to file a brief on whether an attorney could represent a plaintiff and a defendant in the same case.

Bornn elected not to file a brief pursuant to the Court's order. Instead, on July 9, 2008, Bornn and Attorney Adam Hoover, Esq. ("Hoover") filed a notice of substitution of counsel. Hoover is now counsel of record for the Plaintiffs. Bornn remains as counsel for MRCA.

On July 11, 2008, the Court ordered both Bornn and Hoover to file briefs regarding whether Bornn should be disqualified. Bornn filed a brief with several exhibits. Bornn also filed a motion to dismiss MRCA as a defendant in this matter. Hoover also filed a brief in response to the Court's July 11, 2008, order. But for the signature line, Hoover's brief is practically identical to the one filed by Bornn and is accompanied by largely the same exhibits.[2]

In his brief, Bornn explains that he has previously represented the Plaintiffs in legal matters unrelated to the above-captioned matter. Before this matter was commenced, the Plaintiffs purchased a condominium unit at Magen's Ridge Condominium on St. Thomas, U.S. Virgin Islands and became president and secretary of MCRA. The Plaintiffs thereafter engaged Bornn as counsel for MRCA.

This matter was subsequently commenced, and MRCA was named as a defendant. Bornn entered an appearance for MRCA. During the pendency of this matter, the Plaintiffs, represented by Bornn, purchased Banco Popular's note and mortgage. The Plaintiffs apprised MRCA of the purchase. Banco Popular thereafter assigned its interest in the note and mortgage to the Plaintiffs.

Bornn states that he received authority for dual representation from both the Plaintiffs and MRCA, and subsequently filed a notice of appearance on behalf of the Plaintiffs in this matter. These facts are supported by affidavits attached to Bornn's brief from Bornn himself, the Plaintiffs, and one Zona Corbin, MRCA's secretary/treasurer since July 2004. Also attached to Bornn's brief is a July 17, 2006, letter from Bornn to the Plaintiffs and MRCA. The letter advises its addressees of Bornn's dual representation in this matter and is signed by the Plaintiffs and MRCA's president.[3]

II. *DISCUSSION*

"The district court's power to disqualify an attorney derives from its inherent authority to supervise the professional conduct of attorneys appearing before it." *United States v. Miller,* 624 F.2d 1198, 1201 (3d Cir. 1980) (citations omitted); *NCK Org. Ltd. v. Bregman,* 542 F.2d 128, 131 (2d Cir. 1976) (noting that the district court has a "duty to supervise members of its bar"). The Third Circuit has explained that

[a]n attorney who fails to observe his obligation of undivided loyalty to his client injures his profession and demeans it in the eyes of the public. The maintenance of the integrity of the legal profession and its high standing in the community are important additional factors to be considered in determining the appropriate sanction for a Code violation.

International Business Machines Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978) (citing *Hull v. Celanese Corp.,* 513 F.2d 568, 572 (2d Cir. 1975)).

"The maintenance of public confidence in the propriety of the conduct of those associated with the administration of justice is so important a consideration that [the Third Circuit] ha[s] held that a court may disqualify an attorney for failing to avoid even the appearance of impropriety." *Id.* (citations omitted). "Indeed, the courts have gone so far as to suggest that doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification." *Id.* (citations omitted); *see also HealthNet, Inc. v. Health Net, Inc.,* 289 F.Supp.2d 755, 759 (S.D. W.Va. 2003) ("[C]ourts determining whether to disqualify counsel should act to prevent the appearance of impropriety and resolve doubts in favor of disqualification.") (citing *United States v. Clarkson,* 567 F.2d 270, 273 n.3 (4th Cir. 1977)); *Papanicolaou v. Chase Manhattan Bank, N.A.,* 720 F.Supp. 1080, 1083 (S.D.N.Y. 1989) ("Although courts should pause before depriving a party of the counsel of its choice, disqualification is appropriate when a lawyer's conduct might taint the case. In general, then, a district judge should disqualify the offending counsel when the integrity of the adversarial process is at stake.") (citing *Board of Education v. Nyquist,* 590 F.2d 1241, 1246 (2d Cir. 1979)).

"[T]he exercise of th[e] authority [to disqualify] is committed to the sound discretion of the district court." *Miller,* 624 F.2d at 1201. Furthermore, "in its order of disqualification the [district] court has a wide discretion in framing its sanctions so as to be just and fair to all parties involved." *International Business Machines Corp.,* 579 F.2d at 279.

III. *ANALYSIS*

The Court begins its analysis with the American Bar Association's Model Rules of Professional Responsibility (the "Model Rules"), which have been judicially adopted in the Virgin Islands. *See Bluebeard's Castle, Inc. v. Delmar Mktg.,* 886 F.Supp. 1204, 1206-07 (D.V.I. 1995) (citing *Virgin Islands Bar Association v. Boyd-Richards,* 765 F.Supp. 263 (D.V.I. 1991)).

Rule 1.3 of the Model Rules provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Model Rules of Prof' l Conduct R. 1.3. The Preamble to the Model Rules states that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." *Id.* Preamble and Scope ¶ 2.

Rule 1.7(a) of the Model Rules provides, in pertinent part, that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest[, which] exists if the representation of one client will be directly adverse to another client." *Id.* 1.7(a). Courts have held that "[t]he most egregious conflict of interest is representation of clients whose interests are directly adverse *in the same litigation." See People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.,* 980 P.2d 371, 378 (Cal. 1999) (citation omitted) (emphasis supplied); *see also Synergy Tech & Design, Inc. v. Terry,* Civ. No. 06-02073, 2007 U.S. Dist. LEXIS 34463, at *19 (N.D. Cal. May 2, 2007) (noting that "simultaneously representing opposing parties in the same litigation ... is perhaps the most egregious example" of a conflict of interest) (citation omitted); *Jedwabny v. Philadelphia Transportation Co.,* 135 A.2d 252, 254 (Pa. 1957) ("No one could conscionably contend that the same attorney may represent both the plaintiff and defendant in an adversary action. . . . Obviously, the attorney cannot serve the opposed interests of his two clients fully and faithfully. The ancient rule against one's attempting to serve two masters interposes."), *cert, denied,* 355 U.S. 966 (1958) .

Bornn's simultaneous representation of the plaintiffs and a defendant in the same litigation is precisely the sort of situation that Rule 1.7(a) contemplates and that courts roundly find impermissible. *See, e.g., Universal City Studios, Inc. v. Reimerdes,* 98 F.Supp.2d 449, 452 (S.D.N.Y. 2000) ("[I]t is improper *per se* for an attorney to participate in a lawsuit against his or her own client in a situation in which the lawyer has traditional attorney-client relationships with both clients.") (citing *Cinema* 5, *Ltd. v. Cinerama, Inc.,* 528 F.2d 1384, 1387 (2d Cir. 1976)). Still, the Court must determine whether Bornn is covered by any exception.

A review of the Model Rules reveals that there is no exception to Rule 1.7(a) where the lawyer's representation "involve[s] *the assertion of a claim by one client against another client . . . in the same litigation."*[4] Model Rules of Prof'l Conduct R. 1.7(b) (emphasis supplied).[5] Here, there can be no doubt that the Plaintiffs have asserted a claim against MRCA. Accordingly, absent some compelling explanation, Bornn cannot avail himself of Rule 1.7(b)'s exception to Rule 1.7(a)'s prohibition against simultaneous representation of opposing parties in the same case.

Bornn argues that the mandate of Title 28, Section 532 of the Virgin Islands Code ("Section 532") precludes a conflict. Section 532 provides:

Any person having a lien subsequent to the plaintiff upon the same property or any part thereof, or who has given a promissory note or other personal obligation for the payment of the debt or any part thereof, secured by the mortgage or other lien which is the subject of the action, shall be made a defendant in the action. Any person having a prior lien may be made defendant at the option of the plaintiff, or by the order of the court when deemed necessary.

V.I. Code Ann. tit. 28, § 532.

Because the Plaintiffs were required to name all junior lien holders, including MRCA, Bornn argues that Section 532 "does not create 'adverse' parties." (Br. Regarding Dual Representation and Disqualification of Counsel 7) [hereinafter Bornn Br.]. Bornn further asserts that the Plaintiffs and MRCA have never actually been adverse because MRCA has never contested the Plaintiffs' efforts to foreclose their lien. Bornn proceeds to define "adversity" and states that "MRCA and Banco Popular were never adverse parties other than as required by [Section 532]." (*Id.)*

The flaws in Bornn's argument are at least twofold. First, nothing in the plain language, the purpose or the application of Section 532 supports Bornn. Bornn points to no authority whatever for his proposition, and the Court's research has likewise turned up none.

Second, in contrast to Rule 1.7(a), Rule 1.7(b)(3) of the Model Rules does not speak of "adverse" parties. Rather, that rule bars an attorney from representing two clients in the same case in which one client asserts a claim against the other. Here, there can be no doubt that the Plaintiffs have asserted a claim against MRCA, whether of their own volition or to conform to statutory requirements. Bornn fails to advance any cogent argument explaining how that is not so. To the extent Bornn relies on the Plaintiffs' and MRCA's respectively having consented to Bornn's dual representation, that reliance is misplaced. Comment 23 to Rule 1.7 of the Model Rules unambiguously explains that "[p]aragraph (b)(3) prohibits representation of opposing parties in

the same litigation, *regardless of the clients' consent."* Model Rules of Prof'l Conduct 1.7 cmt. (emphasis supplied).

Bornn also relies on Title 28, Section 533 ("Section 533") of the Virgin Islands Code, which provides:

When it is adjudged that any of the defendants have a lien upon the property, the court shall make a like judgment in relation thereto and the debt secured thereby as if such defendant were a plaintiff in the action. When a judgment is given foreclosing two or more liens upon the same property or any portion thereof in favor of different persons not united in interest such judgment shall determine and specify the order of time, according to their priority, in which the debts secured by such lien shall be satisfied out of the proceeds of the sale of the property.

V.I. Code Ann. tit. 28, § 533.

Bornn reads Section 533 to mean that "MRCA's concurrence with Banco [Popular] essentially makes them co-Plaintiffs." (Bornn Br. 8.) According to Bornn, "it would be inconsistent with [Section 533] to claim that MRCA is anything more than a nominal defendant." (*Id.*) .

Section 533 authorizes a court to prioritize the liens of all lien holders in an action. *See,* e.g., *United States v. Smith,* Civ. No. 1999-127, 2006 U.S. Dist. LEXIS 78698, at *3 (D.V.I. Oct. 19, 2006) (prioritizing the parties' liens). That provision allows a court to treat a defendant as if that defendant were a plaintiff only for the limited purpose of determining the priority of liens. Like Section 532, nothing in Section 533 even remotely suggests that an attorney is authorized to represent both the plaintiff lien holder and a defendant lien holder.

Moreover, Bornn's contention that there is no conflict because MRCA is a mere "nominal" defendant is mistaken. A nominal party is "[a] party to an action who has no control over it and no financial interest in its outcome; esp., a party who has some immaterial interest in the subject matter of a lawsuit and who will not be affected by any judgment, but who is nonetheless joined in the lawsuit to avoid procedural defects." Black's Law Dictionary (8th ed. 2004) .[6] It can hardly be said that a holder of a lien against property has no financial interest in the outcome of a lawsuit foreclosing all liens against that property. Nor can there be any serious doubt that such a lien holder has anything other than a material interest in that lawsuit and will indeed be affected by a court's adjudication of that lawsuit. Furthermore, the Virgin Islands Code's requirement that all junior lien holders be joined as defendants is not merely procedural. Rather, that requirement exists to protect the substantive interest of the junior lien holders. Bornn's unsupported characterization of MRCA as a nominal defendant is therefore unconvincing.

Bornn also relies on the Restatement (Third) of the Law Governing Lawyers.[7] Section 121 of the Restatement prohibits conflicts of interest. *See* Restatement (Third) of the Law Governing Lawyers § 121 (2000). Section 122 of the Restatement, like Rule 1.7 of the Model Rules, qualifies that prohibition:

(1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.

(2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:

(a) the representation is prohibited by law;

(b) *one client will assert a claim against the other in the same litigation;* or

(c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.

Id. § 122 (emphasis supplied).[8] Like Rule 1.7(b) of the Model Rules, Section 122 prohibits an attorney's representation of a party in a proceeding when that party asserts a claim against another party in that same proceeding who is also represented by that attorney.[9] Consequently, the Restatement is similarly of no help to Bornn.[10]

Given Bornn's violation of the strict prohibition against representation of a plaintiff and a defendant in the same legal proceeding — as enshrined in Rule 1.7 of the Model Rules — the Court must now determine the appropriate remedy.

The Court has paid due attention to the evidence submitted by Bornn substantiating his claim that both the Plaintiffs and MRCA knowingly consented to his dual representation. The Court acknowledges as well that there is no definitive indication in the record, at least at this point of these proceedings, that either the Plaintiffs or MRCA have been prejudiced by that representation. Nevertheless, the Court fears that the representation of both the Plaintiffs and MRCA is so tainted at this point that disqualification is necessary to preserve the sanctity of these proceedings and to ensure loyal and zealous advocacy for all parties in this matter. *See,* e.g., *Oneida Indian Nation of Wisconsin v. New York,* Civ. No. 79-798, 1983 U.S. Dist. LEXIS 15010, at *7 (N.D.N.Y. Aug. 1, 1983) ("[T]he joint representation in the same lawsuit of parties with adverse interests impairs the integrity of the proceeding itself.") . Indeed, the fact that Hoover, now ostensibly representing the Plaintiffs, filed in response to this Court's July 11, 2008, order a brief that is by all appearances identical to that filed by Bornn, lends further support to the Court's conclusion that at least one of the parties in this matter is not receiving the independent, zealous representation that it deserves and that the law requires.[11]

Moreover, a finding of actual prejudice is not necessarily a prerequisite to a court's disqualification of counsel. Rather, "disqualification in circumstances . . . where specific injury to [a] party has not been shown is primarily justified as a vindication of the integrity of the bar." *International Business Machines Corp.,* 579 F.2d at 283. In light of Bornn's violation of Rule 1.7(a) of the Model Rules — and inability to demonstrate the applicability of Rule 1.7(b) or any other exception — as well as the overwhelming appearance of a conflict of interest, the Court is persuaded that disqualification in this matter is warranted to maintain the "integrity of our judicial process," *Celanese Corp.,* 513 F.2d at 572[12], and "the high standards of the [legal] profession," *Government of India v. Cook Industries, Inc.,* 569 F.2d 737, 739 (2d Cir. 1978).

IV. *CONCLUSION*

For the reasons given above, it is hereby

ORDERED that Bornn is **RELIEVED** of his representation of MRCA; it is further

ORDERED that MRCA, no later than **November 4, 2008,** shall obtain successor counsel or notify the Court of its intention to proceed *pro se;* and it is further

ORDERED that MRCA's motion to dismiss is **DENIED** without prejudice.

Notes:

[1] It is unclear why the Plaintiffs and MRCA renewed their request for entry of default, since default was entered against Lovell and Gigilotti and the record does not reflect that the entry of default was vacated or is otherwise ineffective.

[2] The Court's July 11, 2008, order clearly requires the parties to file separate briefs. Hoover apparently read that requirement to mean that he could simply sign the identical brief filed by opposing counsel and file that brief under separate cover.

[3] The MRCA president who signed the dual representation letter is Chad Nunez's successor.

[4] Other jurisdictions have codified this prohibition without providing an exception. *See, e.g.,* Tex. R. Prof Conduct 1.06(a) ("A lawyer shall not represent opposing parties to the same litigation.").

[5] Rule 1.7(b) qualifies the prohibition in Rule 1.7(a) with a four-part test. Under that conjunctive test, a lawyer may represent a client notwithstanding the existence of a concurrent conflict of interest if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Model Rules of Prof'l Conduct R. 1.7(b). Failure on any prong of Rule 1.7(b) precludes simultaneous representation.

[6] Black's offers the following as an example of a nominal party: "[T]he disinterested stakeholder in a garnishment action." Black's Law Dictionary (8th ed. 2004).

[7] The Virgin Islands Code provides that "the restatements of the law . . . shall be the rules of decision in the courts of the Virgin Islands ... in the absence of local laws to the contrary." V.I. Code Ann. tit. 1, § 4.

[8] Section 122 of the Restatement, unlike Rule 1.7(b) of the Model Rules, is written disjunctively. *See Lawrence v. City of Philadelphia,* 527 F.3d 299, 323 (3d Cir. 2008) (noting "the use of the disjunctive word 'or'") . Consequently, any one of Section 122(2)'s provisions operates on its own to prohibit a particular representation.

[9] Section 128 of the Restatement (Third) of the Law Governing Lawyers states, in relevant part, that "a lawyer in civil litigation may not . . . represent one client to assert or defend a claim against or brought by another client currently represented by the lawyer." Restatement (Third) of the Law Governing Lawyers § 128 (2000). That prohibition is avoided where "all affected clients consent to the representation," but only "under the limitations and conditions provided in § 122." *Id.* As discussed above, Section 122 clearly bars representation where "one client will assert a claim against the other in the same litigation." *Id.* § 122.

[10] Bornn also contends that his dual representation was permissible because MRCA's debt has been satisfied, and thus MRCA need no longer be a party in this matter. That contention fails, however, to address how Bornn's previous simultaneous representation of both the Plaintiffs and MRCA passes ethical muster.

Because Hoover now represents the Plaintiffs, Bornn also relies on Rule 1.9 of the Model Rules, which provides, in pertinent part, that "[a] lawyer who has *formerly* represented a client in a matter shall not thereafter represent another person in the same . . . matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Model Rules of Prof'l Conduct 1.9 (emphasis supplied). Bornn's reliance on Rule 1.9 is misplaced. That rule contemplates a situation in which an attorney's representation of a party in a proceeding terminates and is followed by that attorney's representation of an opposing party in the same proceeding. Significantly, that rule does not address situations in which, as here, an attorney *simultaneously* represents opposing parties in the same proceeding.

[11] In other words, although Hoover has been substituted for Bornn as counsel for the Plaintiffs, the Plaintiffs — Bornn's former clients — and MRCA — Bornn's current client — are still filing the same pleadings as if they were still represented by the same attorney.

[12] The reasoning of the *Celanese Corp.* Court resonates in this matter:

The preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar is paramount. Recognizably important are [the appellant's] right to counsel of her choice. . . . Th[is] consideration[] must yield, however, to considerations of ethics which run to the very integrity of our judicial process.

Celanese Corp., 513 F.2d at 572.